LIBRARY
SUPREME COURT, U. S.
MAR 7 1967
JOHN F. DAVIS, CLERK

RESPONSE NOT PRINTED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1128

WARDEN, MARYLAND PENITENTIARY,
Petitioner,

v.

HERBERT SMALLWOOD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

FRANCIS B. BURCH,
Attorney General of Maryland,

FRED OKEN,
Assistant Attorney General
of Maryland,
1200 One Charles Center
Baltimore, Md. 21201
For Petitioner.

The Daily Record Co., Baltimore, Md. 21203

INDEX

Table of Contents

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statement of the Case	2
Reasons For Granting the Writ:	
1. A confession which was voluntary by prevailing standards ought not to be held involtary 13 years later	9
2. *Davis v. North Carolina, supra,* does not provide a "design for decision" here	10
3. a. Nonvoluntariness of Smallwood's confession was found from disputed facts	13
b. The undisputed historical facts fail to support the findings of the majority of the Court of Appeals	13
Conclusion	15
Appendix A — Opinion of Court (United States Court of Appeals for the Fourth Circuit (September 26, 1966))	1a
Appendix B — Opinion of Court (United States District Court for the District of Maryland (May 13, 1965))	15a
Appendix C — (Newspaper Clippings)	27a

Table of Citations

Cases

	PAGE
Ashdown v. Utah, 357 U.S. 426	10
Brown v. Allen, 344 U.S. 443	10
Cooper v. New York, 346 U.S. 156	10
Crooker v. California, 357 U.S. 433	10
Davis v. North Carolina, 384 U.S. 737	7, 10, 15
Gallegos v. Nebraska, 342 U.S. 55	10, 13
Haley v. Ohio, 332 U.S. 596	13
Johnson v. New Jersey, 384 U.S. 719	8
Lisenba v. California, 314 U.S. 219	10
Smallwood v. Warden, Maryland Penitentiary, 367 F. 2d 945	1
Snyder v. Massachusetts, 291 U.S. 97	15
Stein v. New York, 346 U.S. 156	10
Thomas v. Arizona, 356 U.S. 390	10, 13
Ward v. Texas, 316 U.S. 547	13
Wissner v. New York, 346 U.S. 156	10

Statutes

United States Code:

Title 28, Section 1254(1) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ------

WARDEN, MARYLAND PENITENTIARY,
Petitioner,

v.

HERBERT SMALLWOOD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Warden, Maryland Penitentiary, Petitioner, by Francis B. Burch, Attorney General of Maryland, and Fred Oken, Assistant Attorney General, prays the issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals passed in this case on September 26, 1966. A motion for rehearing *en banc* was denied on November 28, 1966.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals for the Fourth Circuit are reported in *Smallwood v. Warden, Maryland Penitentiary,* 367 F. 2d 945 (1966) and appear in the Appendix herein at page 1a. The opinion of the United States District Court for the District of Maryland is unreported and appears in the Appendix at page 15a.

JURISDICTION

Jurisdiction is conferred upon this Court by Title 28 U.S.C., Section 1254(1). The judgment of the Court of Appeals was entered on September 26, 1966, and its Order denying the petition for a rehearing *en banc* was filed November 28, 1966. Issuance of a certified copy of the judgment in lieu of mandate was stayed by Order dated December 2, 1966, provided that an application for a Writ of Certiorari be filed in the Supreme Court within 90 days from November 28, 1966.

QUESTION PRESENTED

Was Smallwood's confession involuntary?

STATEMENT OF THE CASE

On findings of fact made by the District Court and adopted by the Court of Appeals, opposite conclusions were reached (by a divided court on appeal) regarding the voluntary nature of an oral statement by Smallwood confessing to the crime of murder. The findings of fact that resulted from testimony and other evidence offered at the hearing of Smallwood's petition for a writ of habeas corpus in the United States District Court on March 8, 1965, almost 12 years after the crime, were the following:

> "Clarence Wheeler, who operated a saloon a short distance from the house where Smallwood and his brother Robert lived, was beaten to death in the early morning of May 17, 1953, in the living quarters behind the saloon. The place was then ransacked and set afire.
>
> "Sergeant Walter Wilt of the Maryland State Police (then a trooper) began investigating the murder at 6:40 a.m. on May 17. He learned that a Luger automatic pistol and some money had been taken from the ransacked premises. He obtained a description of the pistol from the man who had sold it to Wheeler.

"While Wilt was at the scene of the crime, he was given a tip by an informer who had previously provided reliable information leading to the solution of a murder case. The informer told Wilt to check on Herbert Smallwood, and Wilt began to develop information about Smallwood's activities. Wilt knew that Smallwood had a criminal record and had recently been discharged from a penal institution. He learned that Smallwood had been drinking during the previous evening and had been seen around midnight at a tavern in the community where Wheeler and Smallwood lived. Wilt also learned that Smallwood had had a T-shirt washed at his sister's home on the morning after the murder.

"Having developed these facts, Wilt, with Lieutenant Brown, Trooper Coleman, Deputy Sheriff Cox, and State's Attorney Barbour, went to the house (about 2:00 p.m. on May 17) which Smallwood occupied with his brother Robert, who was also a suspect. As they approached the house, Smallwood came out, walking toward them; upon seeing the officers, he went behind the house, but shortly reappeared around the corner of the house and walked toward them. While the other men approached Smallwood, Deputy Sheriff Cox searched behind the house, found a Luger pistol, and brought it to the group in front of the house. Smallwood was arrested and taken to the police car, where the officers noticed certain stains on his shoes. They searched his shoes and found $83, including two blood-stained twenty-dollar bills, which were introduced in evidence at the trial.

"A cap which Smallwood said belonged to his brother Robert had been found at or near the scene of the crime, so Robert also was arrested. The brothers were taken to the office of the State's Attorney in the Charles County Court House and questioned there by Wilt, Coleman, Cox, and Barbour for approximately four hours.

"On May 18 the questioning was renewed at approximately 9:00 a.m. It continued until 4:00 p.m., with a

break around noon for lunch. At 4:00 p.m. Smallwood was taken back to the County Jail, given food and allowed to rest. The police noted certain discrepancies in the stories of Smallwood and his brother Robert, and suggested to them that they take lie detector tests. Both men indicated that they were willing. At 7:00 p.m. Smallwood was placed in a police car with his brother, Wilt, Coleman, Cox, and Sheriff Cooksey and taken to Washington. Smallwood knew that he and his brother were being taken to Washington for the purpose of having the lie detector tests taken. During the trip, which lasted about an hour and a half, there was little or no questioning. The brothers were taken to the Metropolitan Police Headquarters in Washington about 8:30 p.m., where they were questioned further by the officers until 12:15 a.m. on the 19th. At that time Smallwood was placed in the custody of Detective James K. McCarty of the Washington police, who asked Smallwood certain preliminary questions and then gave him a lie detector test after Smallwood had signed a statement indicating that he had been advised of his constitutional rights and was taking the test voluntarily.

"At the conclusion of the test, Smallwood was told that he was lying about certain key elements of the crime and that he should tell the truth. He replied that 'the machine had the answers and that should be enough'. At about 2:00 a.m., after further questioning by McCarty, Smallwood stopped denying that he was involved in the crime and told McCarty that he did not have any recollection of the murder because he was too drunk to remember. McCarty informed him that he had to have a recollection because otherwise the lie detector would not have registered physical reactions to certain questions. McCarty asked Smallwood if he would like to speak to one of the Maryland policemen and if he would feel more like telling the truth to them. Smallwood indicated that he would like to talk with Trooper Wilt, stating that he had been treated very nicely by him. McCarty called Wilt

in and told Smallwood that Wilt was the officer in charge of the case, whom Smallwood 'would have to look to, to handle the case for him in Maryland', and that Smallwood should tell him the truth. McCarty left the room while Wilt talked to Smallwood for about 20 minutes.

"Wilt testified at the trial that after the lie detector test he told Smallwood that 'in view of what the machine had shown, and in view of how he must feel, with a crime in his heart, and on his mind, . . . that if he could but get that off his heart, off his mind, he would feel better'. Smallwood asked Wilt what more they wanted when the machine had the answers. Wilt told him that they would like a statement from him, and when Smallwood indicated to Wilt that he would make a statement Wilt called McCarty back into the room. At that time Smallwood admitted being solely responsible from the crime, but still insisted that there were certain things about the case that he could not recollect.

"After this statement, McCarty asked Smallwood if he was willing to tell the story to the other Maryland officers and Smallwood agreed. McCarty called Cooksey, Cox, and Coleman into the room, and Smallwood made a statement very similar to the one that he had just made to McCarty and Wilt.

"At the request of McCarty, Smallwood agreed to tell the story to his brother, and he stated in his brother's presence that he was solely responsible for the crime and that he was sorry. McCarty asked Smallwood to tell his brother how he had been treated from the time he was arrested 'until the present', and Smallwood said that he 'had been treated as good as gold'.

"Wilt then a ked Smallwood if he would be willing to give a written statement to the same effect as the oral statement he had just made, and Smallwood agreed to do this. However, once the written statement was started, Smallwood indicated to the officers that he did not wish to continue and that he did not

want to sign a statement which set forth the facts he had already told them.

"The questioning in Washington was completed sometime between 4:00 a.m. and 5:00 a.m., and Smallwood was taken back to Charles County. On the afternoon of the 19th he signed a statement prepared by Wilt to the effect that he had been well treated during his interrogation, that he had not been offered any rewards or promises, and that he had not been threatened in any way.

"Mudd (F. DeSales Mudd, Esq., counsel appointed by the State court to defend Smallwood) testified at the hearing in this Court that he had been disturbed at the trial by Smallwood's apparent lack of concern. He therefore requested a psychiatric examination before sentence. Dr. Manfred S. Guttmacher conducted such an examination on September 2, 1953. Dr. Guttmacher concluded:

> 'This young colored boy is very seriously defective intellectually and can probably best be classed as a low grade moron. . . .
>
> 'This patient has sufficient intellectual capacity to know the difference between right and wrong and realize the nature and consequences of his acts. Our examination suggests that he is an amoral individual and functions at a very primitive level. There is evidence of strong aggressive, antisocial drives which apparently he keeps under poor control. No doubt, his capacity to control these is further reduced by the use of alcohol.
>
> 'In this examiner's opinion this patient is a seriously defective delinquent who is a real danger to society. If our law recognized the principle of partial responsibility, his mental deficiency might well be considered a mitigating circumstance. However, from a social point of view it increases his potential malignancy; and in consequence, it would certainly seem an unnecessary risk to release this man in the community, at any time in the foreseeable future.'

"The clinical psychologist who also examined Smallwood agreed with Dr. Guttmacher that Smallwood's intelligence was very defective. In his report he stated:

> 'The character structure brought out by the tests is crude, immature, and basically inadequate. His reactions are likely to be impulsive in the extreme, with no attempt at self-discipline. Several of his interpretations of the Roschach inkblots have a quality of violence; thus on Card II he sees "a cat with his head cut off", with "blood running from the neck", and on Card III, a human head with a "blood spot" next to it. This man is quite lacking in any moral principles that would restrain him from aggressive antisocial acts, and there is a strong prospect of violence in his behavior. Only considerations of immediate expediency would act as a deterrent.
>
> 'The general impression is of a mental defective with an extremely primitive, hostile character makeup, capable of a great deal of violence and lacking in any motivation to conform to social norms.'" (Apx. 2a-7a).

The majority opinion indicates that Smallwood's confession would have been adjudged voluntary except for the decision in *Davis v. North Carolina,* 384 U.S. 737 (June 20, 1966), where this Court said that an independent appraisal of the facts required an inference contrary to the finding of the lower courts on the same facts. Asserting *Davis* to be controlling here, the majority of the Court of Appeals, while admitting that the circumstances in *Davis* and other cases were more coercive, declared Smallwood's confession to be "the product of a will overborne".

Chief Judge Haynsworth, dissenting, points out that under the standards of voluntariness prevailing in 1953 when Smallwood made his confession, as well as for at least eight or ten years thereafter, the confession would

have been unassailable, and the actions of the police in connection with it beyond criticism.

He notes that this Court in *Johnson v. New Jersey*, 384 U.S. 719, 731, 733 "has clearly recorded its intention not to require the retrial of prisoners whose confessions were secured under procedures sanctioned by doctrine current at the time of trial or not forbidden by the reasonable implications of decisions then available for the governing of police conduct". To hold otherwise, says the dissenting opinion, is to put police officers everywhere on notice that if they conform to today's standards for the protection of constitutional rights, they nevertheless may be taken to task for their action tomorrow.

The dissenting opinion also points out that the length of Smallwood's interrogation was not a factor in his confession. It resulted from a lie detector test willingly, perhaps even eagerly, taken. Smallwood had yielded nothing to his interrogators. He had easily fielded every question tending to connect him with the crime. He grew more and more confident of his ability to frustrate the police. There is reason to believe that he considered himself more than a match for the lie detector. When the machine pinpointed his falsehoods, his confession followed.

The conviction of Smallwood for murder and his sentence of life imprisonment followed a jury trial presided over by two judges in the Circuit Court for Charles County, Maryland. He was represented by competent court appointed counsel, a former State's Attorney, who attacked the admissibility of Smallwood's confession with every weapon at his command. The issue was tested twice, the first time out of the presence of the jury. The court's instructions reflect the heavy burden on the State to prove the confession voluntary, and the right of the accused to have it

barred from evidence except for the strictest proof of voluntariness. The jury found the confession voluntary and Smallwood guilty of first degree murder.

Smallwood filed a motion for a new trial, contending again that his confession should have been rejected as involuntary. His counsel ordered, and the State provided, a transcript of the trial testimony of a State Police Trooper to whom Smallwood made his oral confession and the District of Columbia Police Department technician who administered the lie detector test. Although Smallwood testified both in the presence and out of the presence of the jury, his testimony was not transcribed because, as his lawyer declared, it did not help the defense. The motion for a new trial was denied.

Smallwood did not appeal his conviction. The circumstances suggest that the decision not to appeal was taken after sober reflection that a successful appeal could ultimately cost him his life.

A post conviction proceeding in the State court did not reach the question of the voluntariness of his confession. The issue was later raised in the Federal District Court together with six other claimed grounds of relief in a Petition for a Writ of Habeas Corpus. The District Court found all contentions to be without merit (Apx. 26a).

REASONS FOR GRANTING THE WRIT

I.

A CONFESSION WHICH WAS VOLUNTARY BY PREVAILING STANDARDS OUGHT NOT TO BE HELD INVOLUNTARY 13 YEARS LATER.

Smallwood's confession conformed to standards of voluntariness prevailing when it was made in 1953 and for years thereafter. To judge it anew by standards of recent vintage

threatens the finality of every criminal judgment except executed capital sentences.

Had Smallwood elected to promptly follow up his conviction by attacking the admissibility of his confession all the way to the Supreme Court, the confession would have withstood attack. Before and after 1953, confessions obtained under arguably more coercive circumstances were held voluntary. See *Lisenba v. California*, 314 U.S. 219 (1941); *Gallegos v. Nebraska*, 342 U.S. 55 (1951), a confession by a 38 year old Mexican farmhand who could neither speak nor write English; *Stein v. New York, Wissner v. New York, Cooper v. New York*, 346 U.S. 156 (1953) the interrogation of three suspects with prior criminal records for 12 out of 32 hours by relays of police officers; *Brown v. Allen*, 344 U.S. 443 (1953), a confession by an illiterate Negro after long confinement and before arraignment; *Thomas v. Arizona*, 356 U.S. 390 (1958), the confession of a 27 year old Negro made 20 hours after being twice roped and threatened with lynching; *Ashdown v. Utah*, 357 U.S. 426 (1958); *Crooker v. California* 357 U.S. 433 (1958).

II.

DAVIS v. NORTH CAROLINA, SUPRA, DOES NOT PROVIDE A "DESIGN FOR DECISION" HERE.

The most important factors from which a will overborne could be inferred in *Davis, supra*, are absent in the case at bar. Davis was not advised of his right to remain silent and to be represented by counsel. Smallwood was advised several times of his constitutional rights, his right to take or refuse a lie detector test. His signed acknowledgment was entered in evidence that he understood his constitutional rights and that he wanted to take the test.

Davis was detained for 16 days in a Detective Headquarters cell not equipped for long confinement. He was interrogated every day, once or twice a day, by two detectives specially assigned as interrogators. In addition, several sessions of interrogation were conducted by three other police officers. Davis lost 15 pounds body weight in 16 days. He was fed two "thin and dry" sandwiches twice a day. Smallwood was arrested at 2:00 p.m. on Sunday, May 17, 1953, and interrogated that day for about an hour, according to the State's evidence, or for four hours according to Smallwood. He was interrogated the next day for some ten hours or considerably less, again depending upon whether Smallwood's testimony at his habeas corpus hearing is believed or the testimony of the State's witnesses. It is undisputed that Smallwood confessed approximately an hour after a lie detector test was administered between 12:15 a.m. and 12:30 a.m. on May 19. It is also undisputed that in the 36 hours between Smallwood's arrest and confession he received ample food and rest.

Davis, on one occasion before his confession, was taken to Asheville, North Carolina, in an effort to shatter his alibi. Another time he was brought to the cemetery where the murder victim's body was found. It was anticipated that the emotional impact of such confrontation would cause him to confess the crime. There is no evidence that Smallwood was subjected to any psychological coercion whatever.

Davis claimed to have been beaten, threatened, coerced, and promised food and a hot bath to induce him to confess. Such elements are absent in the case at bar. During the habeas corpus hearing in the District Court, Smallwood claimed for the first time that the polygraph operator had threatened him, saying that he ought to have his head beat in like the dead man. The charge was disproved and dis-

credited, Smallwood's trial counsel testifying that he had never heard it before.

The only resemblance between the cases of Davis and Smallwood is that both men were about 23 years old when tried for murder, had low IQs, prior criminal experience, and rudimentary education — the fourth grade for Davis and the fifth grade for Smallwood. If Smallwood had any intellectual deficiency, it did not reveal itself at the trial where his demeanor was marked throughout by stoicism and indifference. Had he demonstrated inability to aid his defense, his competent and experienced trial counsel would undoubtedly have taken appropriate action.

The majority of the Court of Appeals strikes down Smallwood's confession for "the coercion of the utterer" lurking within, and for that Smallwood did not confess under circumstances "where his silence or speech, disavowal or avowal, was a ready option". The majority, without saying so directly, infers that it was intellectual deficiency, coupled with overlong interrogation, that were so coercive "as inherently and almost conclusively imputing overbearance of [his] volition and will". Smallwood, however, until the appeal in this case, has always relied on claims of threats, promises, and inducements and the pressures of interrogation as grounds to reject his confession, never any infirmity of intellect. Glossed over or ignored by the Court of Appeals was his familiarity with police procedures and techniques, lessons learned from earlier brushes with the law.

III.

A. NONVOLUNTARINESS OF SMALLWOOD'S CONFESSION WAS FOUND FROM DISPUTED FACTS.

IV.

B. THE UNDISPUTED HISTORICAL FACTS FAIL TO SUPPORT THE FINDINGS OF THE MAJORITY OF THE COURT OF APPEALS.

Disputed facts may not be relied upon in an appeal to reverse a determination that a confession was made voluntarily. Any conflict in testimony must be resolved in favor of the adjudication below that the confession was voluntary. *Thomas v. Arizona, supra; Gallegos v. Nebraska, supra; Haley v. Ohio,* 332 U.S. 596 (1948); *Ward v. Texas,* 316 U.S. 547 (1942).

The majority of the Court of Appeals summarized that Smallwood, a 23 year old, barely literate, high grade or low grade moron with a fifth grade education, was interrogated for four hours on the day of his arrest, detained in jail overnight, and questioned for six hours between 9:00 a.m. and 4:00 p.m. the next day with a break for lunch. He was permitted to rest between 4:00 p.m. and 7:00 p.m., then taken on a 1-1½ hour trip to Washington, D. C., interrogated to 12:15 a.m., when he was given a lie detector test and questioned further until 4:00 a.m. or 5:00 a.m.

These findings represent the unsupported testimony of Smallwood at the habeas corpus hearing on March 8, 1965, and they ignore the State's evidence to the contrary. Nor is there any evidence, aside from Smallwood's belated word, of four hours interrogation before the lie detector test. In this regard, the evidence shows a short inquiry for background information of the subject to be used in the test.

Throughout the findings of fact of the Court of Appeals regarding the interrogation of Smallwood, it is plain that their sole support is his testimony at the habeas corpus hearing. But Smallwood was labeled by the District Judge as "not a credible witness" (Apx. 16a). In any event, the probative value of testimony 12 years after the fact, particularly the self-serving testimony of a man under sentence of life imprisonment for murder, is tenuous indeed. The inability of Smallwood to illuminate the issue of his confession is reflected in a statement by his counsel that the reason Smallwood's trial testimony was not transcribed prior to the motion for a new trial was because it offered no support to the motion, the principal point of which was that the confession was coerced. The evidence that Smallwood, who now professes virtually total recall of the events surrounding his confession, had a complete failure of recollection of the same events when he testified in 1953, may be found in contemporary Washington newspaper accounts (Apx. 27a-33a). They are mute witness that when Smallwood testified two months after the crime, he had, or claimed to have, a lapse of memory which blacked out any recall of his arrest, interrogation, the lie detector test, or the confession.

CONCLUSION

". . . justice, though due to the accused, is due to the accuser also. The concept of fairness is not to be strained until it is narrowed to a filament. We are to keep the balance true". Justice Cardozo in *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934). The Supreme Court has expressed elsewhere its duty to examine the entire record and make an independent determination of the issue of voluntariness. *Davis v. North Carolina, supra;* and cases there cited. This case begs for such review. To that end the Petitioner prays that certiorari may be granted.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General of Maryland,

FRED OKEN,
Assistant Attorney General
of Maryland,

For Petitioner.

APPENDIX A

OPINION OF COURT

United States Court of Appeals
For The Fourth Circuit

No. 10,205

Herbert Smallwood,
Appellant,

versus

Warden, Maryland Penitentiary,
Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore, Roszel C. Thomsen, Chief District Judge.

(Argued April 6, 1966. Decided September 26, 1966.)

Before HAYNSWORTH, Chief Judge, and BRYAN and BELL, Circuit Judges.

ALBERT V. BRYAN, Circuit Judge:

A judgment of conviction with a sentence of life imprisonment for murder was passed October 1, 1953 upon Herbert Smallwood, on a jury verdict in the Circuit Court of Charles County, Maryland. No appeal was taken, but vacation of the conviction and sentence was sought in the State courts through statutory remedies[1] and petitions for habeas corpus, all to no avail.[2] Thereupon he petitioned the

[1] Uniform Post-Conviction Procedure Act, art. 27 § 645A et seq., 3 Annotated Code of Maryland (1957).

[2] Smallwood v. Warden, 231 Md. 652, 191 A. 2d 244 (1964).

Federal district court in Baltimore on January 2, 1964 for habeas corpus.

The grievance Smallwood mainly presses is the reception in evidence at trial, over his counsel's objection, of his oral confession. The incriminating statements are alleged to have been induced through psychological pressure, including the suggestion of relief of mind. This illegality is said to have tinged the trial and thus robbed it of due process. The District Court after a plenary hearing found the confession voluntary and denied the writ. Smallwood appeals.

Since the District Court's decision, Davis v. North Carolina, 384 U.S. 737 (June 20, 1966) on certiorari from this court, has come down. The Supreme Court there took the facts as found and accepted by the lower courts and drew a contrary ultimate inference from them — "that the confessions were the product of a will overborne". The opinion noted that the Court had the duty to "make an independent determination of the ultimate issue of voluntariness". Following this procedure — prescription enjoined upon us, on assaying the facts as found by the District Judge we think they disclose an invalidating involuntariness in Smallwood's confession.

The facts, completely and fairly stated by the District Court, were these:

> "Clarence Wheeler, who operated a saloon a short distance from the house where Smallwood and his brother Robert lived, was beaten to death in the early morning of May 17, 1953, in the living quarters behind the saloon. The place was then ransacked and set afire.
>
> "Sergeant Walter Wilt of the Maryland State Police (then a trooper) began investigating the murder at 6:40 a.m. on May 17. He learned that a Luger automatic pistol and some money had been taken from the ransacked premises. He obtained a description of the pistol from the man who had sold it to Wheeler.

"While Wilt was at the scene of the crime, he was given a tip by an informer who had previously provided reliable information leading to the solution of a murder case. The informer told Wilt to check on Herbert Smallwood, and Wilt began to develop information about Smallwood's activities. Wilt knew that Smallwood had a criminal record and had recently been discharged from a penal institution. He learned that Smallwood had been drinking during the previous evening and had been seen around midnight at a tavern in the community where Wheeler and Smallwood lived. Wilt also learned that Smallwood had had a T-shirt washed at his sister's home on the morning after the murder.

"Having developed these facts, Wilt, with Lieutenant Brown, Trooper Coleman, Deputy Sheriff Cox and State's Attorney Barbour, went to the house [about 2 P.M. on May 17] which Smallwood occupied with his brother Robert, who was also a suspect. As they approached the house, Smallwood came out, walking toward them; upon seeing the officers, he went behind the house, but shortly reappeared around the corner of the house and walked toward them. While the other men approached Smallwood, Deputy Sheriff Cox searched behind the house, found a Luger pistol, and brought it to the group in front of the house. Smallwood was arrested and taken to the police car, where the officers noticed certain stains on his shoes. They searched his shoes and found $83, including two blood-stained twenty-dollar bills, which were introduced in evidence at the trial.

"A cap which Smallwood said belonged to his brother Robert had been found at or near the scene of the crime, so Robert also was arrested. The brothers were taken to the office of the State's Attorney in the Charles County Court House and questioned there by Wilt, Coleman, Cox and Barbour for approximately four hours.

"On May 18 the questioning was renewed at approximately 9:00 a.m. It continued until 4:00 p.m., with a break around noon for lunch. At 4:00 p.m. Smallwood was taken back to the County Jail, given food and allowed to rest. The police noted certain discrepancies in the stories of Smallwood and his brother Robert, and suggested to them that they take lie detector tests. Both men indicated that they were willing. At 7:00 p.m. Smallwood was placed in a police car with his brother, Wilt, Coleman, Cox and Sheriff Cooksey and taken to Washington. Smallwood knew that he and his brother were being taken to Washington for the purpose of having the lie detector tests taken. During the trip, which lasted about an hour and a half, there was little or no questioning. The brothers were taken to the Metropolitan Police Headquarters in Washington about 8:30 p.m., where they were questioned further by the officers until 12:15 a.m. on the 19th. At that time Smallwood was placed in the custody of Detective James K. McCarty of the Washington police, who asked Smallwood certain preliminary questions and then gave him a lie detector test after Smallwood had signed a statement indicating that he had been advised of his constitutional rights and was taking the test voluntarily.[4]

"At the conclusion of the test, Smallwood was told that he was lying about certain key elements of the crime and that he should tell the truth. He replied that

---

"[4] Smallwood testified in this Court that during the lie detector test McCarty told him 'he should have his head beat in like the dead man did'. As noted above, Smallwood is not a credible witness. He did not testify to any threats when he was on the stand during the trial while the Court was considering the admissibility of the oral confessions out of the presence of the jury. McCarty testified at the trial that no threats had been made to Smallwood. His brother testified at the hearing in this Court that during the period he was being questioned by the police no one had threatened him at any time. No doubt during the lie detector test there was some discussion about the nature of the crime, but this Court finds the evidence insufficient to show that any threats were made to Smallwood." [Other footnotes have been omitted because deemed unnecessary.]

'the machine had the answers and that should be enough'. At about 2:00 a.m., after further questioning by McCarty, Smallwood stopped denying that he was involved in the crime and told McCarty that he did not have any recollection of the murder because he was too drunk to remember. McCarty informed him that he had to have a recollection because otherwise the lie detector would not have registered physical reactions to certain questions. McCarty asked Smallwood if he would like to speak to one of the Maryland policemen and if he would feel more like telling the truth to them. Smallwood indicated that he would like to talk with Trooper Wilt, stating that he had been treated very nicely by him. McCarty called Wilt in and told Smallwood that Wilt was the officer in charge of the case, whom Smallwood 'would have to look to, to handle the case for him in Maryland', and that Smallwood should tell him the truth. McCarty left the room while Wilt talked to Smallwood for about 20 minutes.

"Wilt testified at the trial that after the lie detector test he told Smallwood that 'in view of what the machine had shown, and in view of how he must feel, with a crime in his heart, and on his mind, . . . that if he could but get that off his heart, off his mind, he would feel better'. Smallwood asked Wilt what more they wanted when the machine had the answers. Wilt told him that they would like a statement from him, and when Smallwood indicated to Wilt that he would make a statement Wilt called McCarty back into the room. At that time Smallwood admitted being solely responsible for the crime, but still insisted that there were certain things about the case that he could not recollect.

"After this statement, McCarty asked Smallwood if he was willing to tell the story to the other Maryland officers and Smallwood agreed. McCarty called Cooksey, Cox and Coleman into the room, and Smallwood made a statement very similar to the one that he had just made to McCarty and Wilt.

"At the request of McCarty, Smallwood agreed to tell the story to his brother, and he stated in his brother's presence that he was solely responsible for the crime and that he was sorry. McCarty asked Smallwood to tell his brother how he had been treated from the time he was arrested 'until the present', and Smallwood said that he 'had been treated as good as gold'.

"Wilt then asked Smallwood if he would be wiling to give a written statement to the same effect as the oral statement he had just made, and Smallwood agreed to this. However, once the written statement was started, Smallwood indicated to the officers that he did not wish to continue and that he did not want to sign a statement which set forth the facts he had already told them.

"The questioning in Washington was completed sometime between 4:00 and 5:00 a.m., and Smallwood was taken back to Charles County. On the afternoon of the 19th he signed a statement prepared by Wilt to the effect that he had been well treated during his interrogation, that he had not been offered any rewards or promises, and that he had not been threatened in any way.

* * * * * *

"Mudd [F. DeSales Mudd, Esq., counsel appointed by the State court to defend Smallwood] testified at the hearing in this Court that he had been disturbed at the trial by Smallwood's apparent lack of concern. He therefore requested a psychiatric examination before sentence. Dr. Manfred S. Guttmacher conducted such an examination on September 2, 1953. Dr. Guttmacher concluded:

> 'This young colored boy is very seriously defective intellectually and can probably best be classed as a low grade moron. . . .
>
> 'This patient has sufficient intellectual capacity to know the difference between right and wrong and realize the nature and consequences of his

acts. Our examination suggests that he is an amoral individual and functions at a very primitive level. There is evidence of strong aggressive, antisocial drives which apparently he keeps under poor control. No doubt, his capacity to control these is further reduced by the use of alcohol.

'In this examiner's opinion this patient is a seriously defective delinquent who is a real danger to society. If our law recognized the principle of partial responsibility, his mental deficiency might well be considered a mitigating circumstance. However, from a social point of view it increases his potential malignancy; and in consequence, it would certainly seem an unnecessary risk to release this man in the community, at any time in the foreseeable future.'

"The clinical psychologist who also examined Smallwood agreed with Dr. Guttmacher that Smallwood's intelligence was very defective. In his report he stated:

'The character structure brought out by the tests is crude, immature, and basically inadequate. His reactions are likely to be impulsive in the extreme, with no attempt at self-discipline. Several of his interpretations of the Roschach inkblots have a quality of violence; thus on Card II he sees "a cat with his head cut off," with "blood running from the neck," and on Card III, a human head with a "blood spot" next to it. This man is quite lacking in any moral principles that would restrain him from aggressive antisocial acts, and there is a strong prospect of violence in his behavior. Only considerations of immediate expediency would act as a deterrent.

'The general impression is of a mental defective with an extremely primitive, hostile character makeup, capable of a great deal of violence and lacking in any motivation to conform to social norms'."

Abridged, these findings reveal that:

(a) Smallwood was interrogated while in the constant custody of the police, for 4 hours on the afternoon of May 17, 1953; after detention overnight, beginning at 9 a.m. he was questioned for 6 hours during the forenoon and afternoon of May 18, with a lunch break at noon and suspension at 4 p.m. for rest and food; at 7 p.m. he was taken to Washington, D. C., a trip lasting approximately one and one-half hours, and then subjected immediately to further questioning, including the lie detector test, which continued throughout the night, until about 4 or 5 a.m.;

(b) Smallwood submitted to the "lie detector" test, at the conclusion of which he was told by the operator of the device that "he was lying", with apparent reference to the indications of the machine.

(c) Smallwood's mental capacity, authoritatively diagnosed, was "seriously defective", classified as low grade or high grade moron. Although not in the findings, undisputed testimony disclosed that Smallwood was 23 years old at the time of the offense, a tobacco farm laborer with a 5th grade education and able to read only simple words.

Design for decision here has been laid out in Davis v. North Carolina, supra, 384 U.S. 737; Haynes v. Washington, 373 U.S. 503 (1963); and Culombe v. Connecticut, 367 U.S. 568 (1961); they uncompromisingly dictate rejection of Smallwood's confession. The context in which his statements were uttered is there declared by the Supreme Court as inherently and almost conclusively imputing overbearance of the declarant's volition and will. Admittedly, while the circumstances in the cited cases were more coercive, the instant confession cannot escape the condemmnation taught by those decisions. Reiteration of their facts would add nothing here. Our concern is their thesis: that, to be admissible, the confession must be "the product of an essentially free and unconstrained choice".

The facts here fail to demonstrate this theorem, even owning the necessary inexactness of legal proof. Coercion of the utterer lurks within them. The scene was not one where his silence or speech, disavowal or avowal, was a

ready option. At least the record does not confer that conviction. Without it we cannot honor the confession, and we do not.

As the admission of this evidence at trial deprived the defendant-petitioner of due process, we must vacate the judgment and sentence passed upon him. To this end we reverse the order of the District Court denying Smallwood's petition. The case will be remanded with directions that Maryland be allowed a reasonable opportunity to retry Smallwood, failing which the District Court shall issue its writ of habeas corpus for his release from custody under the indictment. Nothing we have said, however, shall preclude the State from holding Smallwood for or under such civil proceedings and process as may be provided by its laws for the detention of persons found to be dangerous to the public safety, as the medical testimony in this case describes Smallwood.

Reversed and remanded.

HAYNSWORTH, Chief Judge, dissenting:

Smallwood was convicted in 1953. Under the standards then prevailing, there is no question but that his confession was not involuntary and was properly admissible. If the Supreme Court had taken the case on direct review, it would have affirmed the conviction.[1]

Some eight to ten years after Smallwood's conviction, the Supreme Court began to apply more stringent standards.[2] Moving responsively to a sense of need to develop those standards have been supplemented and, to a large effective protections against oppressive police practices, evolving standards for the resolution of the involuntariness question were applied with an increasing exactness. Finally,

---

[1] Thomas v. Arizona, 356 U.S. 390; Ashdown v. Utah, 357 U.S. 426; Crooker v. California, 357 U.S. 433; Cicenia v. Lagay, 357 U.S. 504. These cases were decided in 1958, well after a direct appeal in this case would have reached the Supreme Court.

[2] Culombe v. Connecticut, 367 U.S. 568; Haynes v. Washington, 373 U.S. 503; Davis v. North Carolina, 384 U.S. 737.

extent displaced, by *Miranda's*[3] new standards. *Miranda* is not to be applied retroactively to this case,[4] and the principal question on this appeal is what standard is to be applied in answering the question of involuntariness. That standard is not so uncertain in its general verbal formulation; our difficulty arises out of the practical necessity to determine the dimensions of the rule by which we are to measure the conduct of the police in this case.

If the gauge is cut to the dimensions prescribed in the most recent pronouncements of the Supreme Court, there were some indicia of coercion. The length of the interrogation is the principal one, but the confession does not appear to have been its product. The confession was the direct and immediate result of his belief that the lie decteor had revealed his falsehoods and disclosed the truth.[5] He had consented to that test. He had sought no outside assistance, but nothing had been done or said to create in him the impression that he could not have done so had he wished. After the confession, he told his brother he "had been treated as good as gold."

---

[3] Miranda v. Arizona, 384 U.S. 436.

[4] Johnson v. New Jersey, 384 U.S. 719.

[5] Smallwood's actions during the questioning and shortly thereafter do not indicate that his will was broken by overbearing police. Until after the lie detector test, he stoutly denied his guilt. The extensive questioning, even against the background of incriminating physical evidence, did not cause him to waver. He uttered not a word to link himself to the crime. His prior dealings with the police were standing him in good stead. His consent to take the lie detector test was made in a noncoercive atmosphere, after a three-hour rest period during which he had been fed. His desire to take the test, beat it and thus secure his release, seems clear enough, but when faced with its negative results, he almost immediately implicated himself. This indicates that his confession was the product of the results of the lie detector test, fairly rendered, and not here claimed to have been coercive. That he was not induced to talk by the length of the interrogation or any overbearing was reemphasized by Smallwood's action subsequent to the two oral confessions. At first, he agreed to dictate a statement to the officers, and sign a transcript of it, but just after this procedure began he changed his mind and refused to proceed. He was not a malleable toy doing anything the police wanted. Later, the next afternoon, when the effect of any imagined coercive practices had dissipated, he signed a statement that he had not been abused or mistreated in any way.

On the whole record, the circumstances are far milder than those in any case in which the Supreme Court has found a confession involuntary[6] to overturn the District

[6] Without close comparison of the facts in the relevant Supreme Court cases with those in this case no conclusion can rest upon a firm foundation. An assumption that after *Davis*, the slightest pressure to speak is impermissible and unlawfully coercive, regardless of when it was exerted and under what circumstances, is unwarranted. "The nature and components of this problem, concerning as it does liberty and security, had better be overtly and critically examined than smothered by unanalyzed assumptions." Culombe v. Connecticut, 367 U.S. 568, 578.

Through the years it has been recognized that the police may use a certain amount of pressure, yet be free of unlawful coercion. As late as 1964 it was said with some validity that

> "a fairly high degree of pressure may be applied before the Supreme Court will term the confession 'involuntary.' The rulings of the Court buttress such a conclusion. It has held that the use of certain psychological pressure tactics for a limited time does not require exclusion of a resulting confession. The police may illegally detain the accused, fail to warn him of his rights, or deny him access to counsel without necessarily overbearing his will." Spanogle, The Use of Coerced Confessions in State Courts, 17 Vand. L. Rev. 421, 428.

Miranda has changed much of that, but we deal with pre-*Miranda* standards..

Nothing appears in the treatment of Smallwood to rival that received by Davis, Haynes, or Culombe. I need not now stop to detail the facts in those cases, but each was subjected to infinitely greater pressure than was Smallwood. Each of them understood that the police intended to extract a confession, regardless of its truth, and each finally succumbed to the pressure that was applied.

In contrast, Smallwood obviously believed that his detention would soon end after he beat the lie detector. That belief may prove Smallwood's stupidity, but it is inconsistent with a theory of meek submission to the mounting pressures of extending interrogation. Here, too, the police are not easily cast in a villainous role. They carried out their duties as they knew them in 1953. They did nothing which they then had any reason to believe was an impropriety.

Culombe begins with the premise that questioning is not to be limited to an ineffective formal ceremony presided over by the suspect. "[W]hatever reasonable means are needed to make the questioning effective must be also conceded to the police." Despite the effect *Miranda* will have upon cases tried subsequent to its decision, the language of *Culombe* is still highly relevant to the decision of coercion issues in the pre-*Miranda* cases.

Court's finding here, the majority applies a still narrower gauge, for the conflicting inferences which the record supports are disregarded and the relatively mild indicia of coercion are accepted as conclusive. No case in the Supreme Court has commanded that approach. No case in the Supreme Court "dictates" an appellate finding of coercion here.

If the guage is cut to the pattern of earlier Supreme Court cases, the confession was not even arguably coerced. In 1953, there was no decision, or group of decisions, in the Supreme Court which can be said to have foreshadowed proscription of the procedures followed by the police in this case.[7]

---

[7] No coercion was found in Stein v. New York, 346 U.S. 156, decided in 1953, where the Court said:

> "Both Stein and Cooper confessed only after about twelve hours of intermittent questioning. In each case this was stretched out over a 32-hour period, with the suspect sleeping and eating in the interim. In the case of Cooper, a substantial part of this time he spent driving a bargain with the police and the parole officers. It also is true that the questioning was by a number of officers at a time and by different officers at different times. But we cannot say that the use of successive officers to question these petitioners for the periods of time indicated is so oppressive as to overwhelm powers of resistance. While we have reversed convictions founded on confessions secured through interrogations by 'relays,' we have also sustained convictions when, under different circumstances, the relay technique was employed. But we have never gone so far as to hold that the Fourteenth Amendment requires a one-to-one ratio between interrogators and prisoners, or that extensive questioning of a prisoner automatically makes the evidence he gives in response constitutionally prohibited.
>
> "* * *
>
> "Of course, these confessions were not voluntary in the sense that petitioners wanted to make them or that they were completely spontaneous, like a confession to a priest, a lawyer, or a psychiatrist. But in this sense no criminal confession is voluntary.
>
> "Cooper's and Stein's confessions obviously came when they were convinced that their dance was over and the time had come to pay the fiddler."

Also, in Brown v. Allen, 344 U.S. 443, decided in the same year, the illiterate petitioner was held after arrest for five days before being charged with the crime, and eighteen days before he was given a

In *Johnson*[8] the Supreme Court has clearly recorded its intention not to require the retrial of prisoners whose confessions were secured under procedures sanctioned by doctrine current at the time of trial or not forbidden by the reasonable implications of decisions then available for the governance of police conduct. If the police carefully observed the rules as reasonably understood in 1953, the burden of retrial ought not now in this belated collateral proceeding be cast upon the state, nor the risk of Smallwood's release be cast upon the innocent public.

Smallwood is a violent man. His motivation is so primitive and poor that the psychiatrists agree that under the influence of alcoholic drink, he can be expected to become homicidal again. He is unquestionably guilty of the crime of which he was convicted; his confession was clearly truthful.

Such considerations are irrelevancies if his conviction was constitutionally infirm when the judgment was entered.

---

preliminary hearing. During the entire period he was without counsel's aid. Yet the conviction withstood the scrutiny of the Supreme Court.

There was none of the "pressure of unrelenting interrogation" directed at Smallwood which the Court condemned in Watts v. Indiana, 338 U.S. 49 (1949). In that case Watts was arrested on November 12, 1947 and became a suspect for murder. He was questioned in relays by officers from about 11:30 that night until 3:00 o'clock the following morning. The same procedure of persistent interrogation from about 5:30 in the afternoon until about 3:00 o'clock the following morning, by a relay of six to eight officers, was pursued on the 13th, 14th, 15th, 17th, and 18th, when Watts finally broke. During the entire time he was given little food and less sleep. Between questioning sessions he was placed in "the hole." See also Turner v. Pennsylvania, 338 U.S. 62, and Harris v. South Carolina, 338 U.S. 68, decided concurrently with *Watts*. In both *Turner* and *Harris* there was relay questioning and incommunicado detention of over five days' duration.

These were the cases which the police in 1953 had available for their guidance, *Stein* v. *New York* and *Brown* v. *Allen* showing what was permissible and how extensive interrogation might be, *Watts*, *Turner* and *Harris* showing what was impermissible. The police here were well within the *Stein* and *Brown* limits.

[8] Johnson v. New Jersey, 384 U.S. 719, 731, 733.

Current astuteness in the protection of individual rights is not at odds with the interests of a society which places high values upon liberty and justice and freedom and fairness. It is the cornerstone of such a society. If one innocent suffers harm which an authoritarian society might have avoided, millions of individuals are assured of protection of their rights and of their dignity. But there was no such infirmity in Smallwood's conviction, for all agree that in 1953 it was unassailable. The question then arises of the values which should govern judgment in the dubious application, thirteen years later, of a shortened standard to compel the release of this undeserving man of violence upon defenseless individuals when retrial may be impossible because of the unavailability of witnesses and civil commitment, the plaintive suggestion of the majority, highly uncertain.

Smallwood's conditional release cannot correct any mistake the police made thirteen years ago. If the officers involved are still on active duty, today's decision will not assist their understanding of their duty. What we say adds nothing to *Miranda's* guidelines; they undermine them, for we inform police officials that, if they observe Miranda's standards today, we may censure them for it tomorrow.

While today's decision can make no positive contribution to police procedures in the future, it undermines what little finality there is in criminal judgments. This runs counter to the Supreme Court's course in *Johnson* in which the desirability of finality in criminal judgments comporting with current constitutional standards is recognized. It is not fair to the states or to the public to vacate judgments as old as this one on the basis of evolving constitutional standards which could not have been reasonably anticipated by the police at the time they acted.

An appraisal of the values which influence our judgment point clearly toward affirmance. The principle of *Johnson* seems to me to require it.

For these reason, I respectfully record my dissent.

APPENDIX B

OPINION OF COURT

(Filed May 13, 1965)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil No. 15197

Herbert Smallwood

v.

Warden, Maryland Penitentiary

THOMSEN, Chief Judge:

This petition for a writ of habeas corpus, filed by a State prisoner who was convicted of a brutal murder in 1953 and sentenced to life imprisonment, presents in aggravated form many of the problems which must be faced in such cases by a judge who is anxious to see that the petitioner has not been denied any constitution right, but is also concerned that the public be protected from an extremely dangerous man.

Smallwood was convicted of first-degree murder by a jury in the Circuit Court for Charles County on July 29, 1953. A motion for new trial was denied by Judge Digges and Judge Gray on August 17, and a sentence of imprisonment for life was imposed on October 1. No appeal was taken, but Smallwood filed many habeas corpus petitions in the State courts. In 1959 he filed an application for relief under the PCPA.[1] A hearing thereon was held before

[1] Anno. Code of Maryland (1957 ed.), Article 27, section 645A-J.

Judge Dorsey, at which Smallwood was not present but was represented by a court-appointed attorney. No testimony was taken, but points of law were argued. In an opinion filed in March 1962, Judge Dorsey considered the seven contentions raised by Smallwood and denied relief. Later in 1962, Smallwood filed a second application for PCPA relief, which was dismissed on the ground that no new contentions were raised which could not reasonably have been raised in the first petition. An application for leave to appeal was denied by the Court of Appeals of Maryland on June 4, 1963. *Smallwood v. Warden*, 231 Md. 652.

In his present habeas corpus petition Smallwood raised numerous points, some of which are so clearly without any basis in fact that they were abandoned by his counsel, with Smallwood's consent, at the outset of the hearing in this Court. Those now being pressed by counsel of by Smallwood himself are: (1) that Smallwood was compelled to testify against himself; (2) that the State suppressed or withheld exculpatory evidence; (3) that Smallwood was illegally arrested and searched, and that illegally seized evidence was used against him at his trial; (4) that Smallwood's trial counsel was incompetent; (5) that an illegally obtained confession was admitted into evidence.

Smallwood himself is not a credible witness; his recollection of the facts upon which his various points are based has evidently been affected by advice from fellow prisoners. Some of the persons who might have testified on the various points raised are dead or otherwise unavailable. The reporter at the trial is now dead, and no one is able to read his notes. The charge to the jury and part of the testimony of two witnesses dealing with the confession were transcribed for the new trial motion and are in the record. For evidence as to what else transpired at the trial, this Court has had to rely principally upon the recollection of the attorneys who participated in the trial, together with the other testimony taken at the hearing in this Court.

Since the judge who ruled on the PCPA applications did not grant an evidentiary hearing and therefore made no

findings of fact which can be accepted by a federal court, *Townsend v. Sain*, 372 U.S. 293 (1963), this Court must make such findings, as well as pass on the constitutional points which have been raised.

Findings of Fact

Clarence Wheeler, who operated a saloon a short distance from the house where Smallwood and his brother Robert lived, was beaten to death in the early morning hours of May 17, 1953, in the living quarters behind the saloon. The place was then ransacked and set afire.

Sergeant Walter Wilt of the Maryland State Police (then a trooper) began investigating the murder at 6:40 a.m. on May 17. He learned that a Luger automatic pistol and some money had been taken from the ransacked premises. He obtained a description of the pistol from the man who had sold it to Wheeler.

While Wilt was at the scene of the crime, he was given a tip by an informer who had previously provided reliable information leading to the solution of a murder case. The informer told Wilt to check on Herbert Smallwood, and Wilt began to develop information about Smallwood's activities. Wilt knew that Smallwood had a criminal record and had recently been discharged from a penal institution. He learned that Smallwood had been drinking during the previous evening and been seen around midnight at a tavern in the community where Wheeler and Smallwood lived. Wilt also learned that Smallwood had had a T-shirt washed at his sister's home on the morning after the murder.

Having developed these facts, Wilt, with Lieutenant Brown, Trooper Coleman, Deputy Sheriff Cox and State's Attorney Barbour, went to the house which Smallwood occupied with his brother Robert, who was also a suspect. As they approached the house, Smallwood came out, walking toward them; upon see the officers, he went behind the house, but shortly reappeared around the corner of the house and walked toward them. While the other men ap-

proached Smallwood, Deputy Sheriff Cox searched behind the house, found a Luger pistol, and brought it to the group in front of the house. Smallwood was arrested and taken to the police car, where the officers noticed certain stains on his shoes. They searched his shoes and found $83, including two blood-stained twenty-dollar bills, which were introduced in evidence at the trial.[2]

A cap which Smallwood said belonged to his brother Robert had been found at or near the scene of the crime, so Robert also was arrested. The brothers were taken to the office of the State's Attorney in the Charles County Court House and questioned there by Wilt, Coleman, Cox and Barbour for approximately four hours.

On May 18 the questioning was renewed at approximately 9:00 a.m. It continued until 4:00 p.m., with a break around noon for lunch.[3] At 4:00 p.m. Smallwood was taken back to the County Jail, given food and allowed to rest. The police noted certain discrepancies in the stories of Smallwood and his brother Robert, and suggested to them that they take lie detector tests. Both men indicated that they were willing. At 7:00 p.m. Smallwood was placed in a police car with his brother, Wilt, Coleman, Cox and Sheriff Cooksey and taken to Washington. Smallwood knew that he and his brother were being taken to Washington for the purpose of having the lie detector tests taken. During the trip, which lasted about an hour and a half,

---

[2] The brief available extract from Wilt's testimony at the trial is ambiguous, but supports an inference that the Luger was found after the arrest. His testimony at the hearing in this Court is that Cox had found the pistol before Smallwood was arrested. It is not necessary to resolve any conflict in the testimony, because it is clear that Cox had found the Luger before the officers searched Smallwood's person and found the money which was offered in evidence. Smallwood claims that the police illegally searched his house, and that a wash basin was removed from his bedroom. No blood stains were found on the wash basin, and there is no evidence that it was ever introduced in evidence at the trial. Smallwood was not prejudiced by the claimed illegal search of his house.

[3] The Court does not accept Smallwood's testimony that he was not given any lunch.

there was little or no questioning. The brothers were taken to the Metropolitan Police Headquarters in Washington about 8:30 p.m., where they were questioned further by the officers until 12:15 a.m. on the 19th. At that time Smallwood was placed in the custody of Detective James K. McCarty of the Washington police, who asked Smallwood certain preliminary questions and then gave him a lie detector test after Smallwood had signed a statement indicating that he had been advised of his constitutional rights and was taking the test voluntarily.[4]

At the conclusion of the test, Smallwood was told that he was lying about certain key elements of the crime and that he should tell the truth. He replied that "the machine had the answers and that should be enough". At about 2:00 a.m., after further questioning by McCarty, Smallwood stopped denying that he was involved in the crime and told McCarty that he did not have any recollection of the murder because he was too drunk to remember. McCarty informed him that he had to have a recollection because otherwise the lie detector would not have registered physical reactions to certain questions. McCarty asked Smallwood if he would like to speak to one of the Maryland policemen and if he would feel more like telling the truth to them. Smallwood indicated that he would like to talk with Trooper Wilt, stating that he had been treated very nicely by him. McCarty called Wilt in and told Smallwood that Wilt was the officer in charge of the case, whom Smallwood "would have to look to, to handle the case for him in Maryland", and that Smallwood should tell him the

[4] Smallwood testified in this Court that during the lie detector test McCarty told him "he should have his head beat in like the dead man did". As noted above, Smallwood is not a credible witness. He did not testify to any threats when he was on the stand during the trial while the Court was considering the admissibility of the oral confessions out of the presence of the jury. McCarty testified at the trial that no threats had been made to Smallwood. His brother testified at the hearing in this Court that during the period he was being questioned by the police no one had threatened him at any time. No doubt during the lie detector test there was some discussion about the nature of the crime, but this Court finds the evidence insufficient to show that any threats were made to Smallwood.

truth.[5] McCarty left the room while Wilt talked to Smallwood for about 20 minutes.

Wilt testified at the trial that after the lie detector test he told Smallwood that "in view of what the machine had shown, and in view of how he must feel, with a crime on his heart, and on his mind, * * * that if he could but get that off his heart, off his mind, he would feel better". Smallwood asked Wilt what more they wanted when the machine had the answers. Wilt told him that they would like a statement from him, and when Smallwood indicated to Wilt that he would make a statement Wilt called McCarty back into the room. At that time Smallwood admitted being solely responsible for the crime, but still insisted that there were certain things about the case that he could not recollect.

After this statement, McCarty asked Smallwood if he was willing to tell the story to the other Maryland officers and Smallwood agreed. McCarty called Cooksey, Cox and Coleman into the room, and Smallwood made a statement very similar to the one that he had just made to McCarty and Wilt.

At the request of McCarty, Smallwood agreed to tell the story to his brother, and he stated in his brother's presence that he was solely responsible for the crime and that he was sorry. McCarty asked Smallwood to tell his brother how he had been treated from the time he was arrested "until the present", and Smallwood said that he "had been treated as good as gold".

Wilt then asked Smallwood if he would be willing to give a written statement to the same effect as the oral statement he had just made, and Smallwood agreed to do this. However, once the written statement was started, Smallwood indicated to the officers that he did not wish to continue and that he did not want to sign a statement which set forth the facts he had already told them.

The questioning in Washington was completed sometime between 4:00 and 5:00 a.m., and Smallwood was taken

[5] McCarty so testified at the trial in Charles County.

back to Charles County. On the afternoon of the 19th he signed a statement prepared by Wilt to the effect that he had been well treated during his interrogation, that he had not been offered any rewards or promises, and that he had not been threatened in any way.

Shortly thereafter Smallwood was indicted for murder. His brother Robert was not.

F. DeSales Mudd, an experienced attorney in Charles County, and George W. Bowling, a younger man, were appointed by the Court to defend Smallwood. This Court finds that they prepared the case and represented Smallwood at the trial competently. Material incidents at the trial will be discussed below. The officers testified to the oral confession which Smallwood had made and to the circumstances surrounding the confession. Smallwood's counsel objected to the admissibility of the confession; the testimony of seven witnesses was taken out of the presence of the jury, but the objections were overruled. After the verdict, Mudd and Bowling filed a timely motion for new trial, had the reporter write up the charge and part of the evidence dealing with the confession. They argued the motion orally to the judges who had presided at the trial, but the motion was overruled.

Mudd testified at the hearing in this Court that he had been disturbed at the trial by Smallwood's apparent lack of concern. He therefore requested a psychiatric examination before sentence. Dr. Manfred S. Guttmacher conducted such an examination on September 2, 1953. Dr. Guttmacher concluded:

> "This young colored boy is very seriously defective intellectually and can probably best be classed as a low grade moron. * * *.
>
> "This patient has sufficient intellectual capacity to know the difference between right and wrong and realize the nature and consequences of his acts. Our examination suggests that he is an amoral individual and functions at a very primitive level. There is evidence of strong aggressive, antisocial drives which

apparently he keeps under poor control. No doubt, his capacity to control these is further reduced by the use of alcohol.

"In this examiner's opinion this patient is a seriously defective delinquent who is a real danger to society. If our law recognized the principle of partial responsibility, his mental deficiency might well be considered a mitigating circumstance. However, from a social point of view it increases his potential malignancy; and in consequence, it would certainly seem an unnecessary risk to release this man in the community, at anytime in the foreseeable future."

The clinical psychologist who also examined Smallwood agreed with Dr. Guttmacher that Smallwood's intelligence was very defective. In his report he stated:

"The character structure brought out by the tests is crude, immature, and basically inadequate. His reactions are likely to be impulsive in the extreme, with no attempt at self-discipline. Several of his interpretations of the Roschach inkblots have a quality of violence; thus on Card II he sees 'a cat with his head cut off,' with 'blood running from the neck,' and on Card III, a human head with a 'blood spot' next to it. This man is quite lacking in any moral principles that would restrain him from aggressive antisocial acts, and there is a strong prospect of violence in his behavior. Only considerations of immediate expediency would act as a deterrent.

"The general impression is of a mental defective with an extremely primitive, hostile character make-up, capable of a great deal of violence and lacking in any motivation to conform to social norms."

Although the recollections of the witnesses are blurred by the lapse of twelve years, I find that after the motion for new trial was denied and sentence imposed Mudd discussed with Smallwood his right to appeal, and pointed out the possibility of a death sentence if a reversal and retrial were obtained. Smallwood and his counsel had

reason to be gratified that a death sentence had not been imposed, in view of the brutality of the crime, and I find that Smallwood deliberately and with knowledge of his rights decided at that time not to appeal. I find quite incredible Smallwood's testimony that he instructed his counsel several times to enter an appeal and that they failed and refused to do so. This is denied by counsel, and the charge is implausible.

In a vague letter to Mudd dated October 25, 1953, the date of mailing and receipt not being available, Smallwood complained that he had not received justice and said that he would like to "go up on a writ". Mudd replied on November 5, 1953, that there was nothing he could do at that time, that he had made a full report of the case to the NAACP and that they had determined that everything was being done that could be done.

Beginning in 1953, Smallwood filed many habeas corpus petitions in the state courts, and filed his first application under the PCPA in 1959.

Discussion

(1) Smallwood's first contention is that he was "compelled to testify against himself". He testified in this Court that he was not advised by the Trial Court or by his counsel of his right not to testify in his own behalf and that failure to do so would not be an inference of guilt; that if he had been so advised, he would not have testified, because his prior criminal record, which includes several crimes of a serious nature, could not otherwise have been submitted to the jury. On the other hand, Mudd testified that he had advised Smallwood of his rights and had advised him to testify, notwithstanding his record, and that Smallwood had agreed. This Court finds the facts to be as testified to by Mudd and not as testified to by Smallwood. The point is without merit.

(2) Smallwood contends that the State suppressed or withheld exculpatory evidence, namely, a blue shirt with a blood stain on it and a cap found at the scene of the crime, both of which belonged to his brother Robert. The evidence

shows that the cap was in the possession of the officers on May 17 and was one of the reasons why they suspected that one or both of the brothers were involved. The shirt was offered in evidence at the trial, and the jury was told that the shirt was not the defendant's. Smallwood and his attorneys knew about the cap, and it was referred to in argument before the jury as a weak link in the State's circumstantial case. There was no suppression or withholding of exculpatory evidence.

(3) Smallwood contends that he was illegally arrested and searched and that evidence which had been illegally seized was used against him at his trial. There is no merit in this contention. If, as the testimony at the hearing indicates, Smallwood was not arrested until after the Luger pistol had been found (see note 2 above), there can be no question about the probable cause for his arrest. The Luger pistol was found outside the house where the officers had a right to search apart from any arrest. *Hester v. United States*, 265 U.S. 57 (1924), *Janney v. United States*, 206 F. 2d 601 (1953), *United States v. Hayden*, D. Md., 140 F. Supp. 429, 435 (1956). If Smallwood was arrested and not merely accosted, see *McChan v. State*, ... Md. ....., 207 A. 2d 632 (1965), before the pistol was found, the question of probable cause is more difficult, but the pistol was found a minute or two later, before Smallwood was searched. Thus, in any event, the police had probable cause to arrest him at the time he was searched, and the search incident to the arrest was lawful. *Ker v. California*, 374 U.S. 23 (1963).

(4) Smallwood complains that his court-appointed counsel did not advise him of his right not to testify, did not make use of exculpatory evidence, and refused to protect his right to appeal after repeated requests that they do so. This Court has found that Smallwood's counsel did advise him of his right not to testify and that they did make use of the exculpatory evidence. This Court has also found that after the life sentence was imposed Smallwood and his counsel deliberately decided that he would not appeal. There is no evidence as to when Smallwood's vague letter dated October 25 was actually received by Mudd. Mudd replied on November 5. This Court is satisfied that if Mudd

had received the letter before the thirty days for appeal had expired and had construed it as a request to appeal, he would have entered the appeal or reported the matter to the Court.[6]

This Court concludes that there was no such incompetence of counsel as would justify relief on that ground. *Snead v. Smyth*, 4 Cir., 273 F. 2d 838 (1959); *Brown v. Pepersack*, 4 Cir., 334 F. 2d 9 (1964).

(5) Smallwood's final point is that his oral confession was illegally obtained and that the testimony of the officers with respect thereto should not have been admitted in evidence. This point was raised at the trial, but Judge Digges and Judge Gray, after hearing testimony, decided that the oral statements were voluntarily made and therefore admissible. The statements were made about 36 hours after Smallwood was arrested. He and his brother had been questioned during half of the intervening time, but the Trial Court and this Court have both found that no threats were made against him. Even the partial record which is available shows that Smallwood had been informed of his constitutional rights on several occasions and understood that he was not obliged to any or do anything that might incriminate him. He had never asked for a lawyer at any time during the questioning. The only credible evidence which might be construed to show a promise or an inducement is set out in the following paragraph.

McCarty testified at the trial that after Smallwood had told him that he would like to talk to Wilt, McCarty said to Smallwood that Wilt was the officer in charge of the case, whom Smallwood "would have to look to, to handle the case for him in Maryland", and that Smallwood should tell him the truth. Wilt testified he told Smallwood that "in view of what the machine had shown, and in view of

[6] In view of the previous decision not to appeal, the vague character of the letter, and the reference to a writ, Mudd may have thought that Smallwood was referring to the possibility of a writ of habeas corpus. It is noteworthy that Smallwood filed his first petition for a writ of habeas corpus in a State court about two months later and that he never made any effort to secure a belated appeal.

how he must feel, with a crime on his heart, and on his mind, * * * that if he could but get that off his heart, off his mind, he would feel better."

In the light of all the circumstances, this Court concludes that the oral confessions were voluntarily made. The admission of testimony with respect thereto did not violate Smallwood's constitutional rights. In view of the evidence the police had uncovered, a day and a half was not an unreasonable time to question the brothers to determine whether one or both of them should be charged with the murder.

The relief prayed for is hereby denied and the petitioner is hereby remanded to the custody of the respondent.

APPENDIX C

Court Accepts Confesson in Murder Trial

Lie Detector Test Results Barred As Evidence in LaPlata Slaying

By Paul Sampson
Post Reporter

La Plata, Md., July 28. An Oral confession made by a 23-year-old laborer charged with first degree murder was introduced in the man's trial here today over the objections of the defense attorneys.

Circuit Court Judges John B. Gray and J. Dudley Digges, however, denied admission of the results of a lie detector test, the defendant, Herbert Smallwood, of Rison, Md., took after his arrest. Rison is five miles south of Indianhead, Md.

Smallwood is charged with the robbery slaying of John Clarence (Stormy) Wheeler, 64-year-old Rison tavern owner. Wheeler was found beaten to death in his tavern the morning of May 17. The tavern had been set on fire and Wheeler's body was charred.

Testimony in the trial, which opened yesterday, was completed late this afternoon and court was adjourned until Wednesday. The all-male jury will hear final arguments today and begin deliberation on a verdict.

Smallwood testified for about half an hour this afternoon. Under questioning by Defense Attorney F. DeSales Mudd, he related that the day before the slaying he was paid for a week's work and got drunk.

Smallwood said he visited two bars in the neighborhood during the afternoon after being paid. He testified, however, that he could not remember what happened later in the day. The next thing he remembered was being in police custody at the Charles County Courthouse here, he said.

Under cross examination by States Attorney Robert T. Barbour, Smallwood repeatedly denied any memory of the events of the night of the slaying and of his arrest.

He answered most questions with, "I don't remember," "not as I know of," or "not as I remember."

Smallwood said he did not recall being taken to Washington for a lie detector test or making an oral confession of the crime after the test.

Smallwood's brother, Robert, 30, with whom he lived in a small house near Wheeler's tavern, testified today that his brother, to his knowledge, did not come home the night of the slaying. Robert said that his brother came in shortly before daybreak.

Both Robert and Herbert were arrested after a gun stolen from the tavern was found in weeds near their house. Robert was released under bond as a material witness.

Police testified Monday that lie detector tests given to Robert and Herbert indicated that Robert was telling the truth but Herbert was not.

After the slaying, $83 in bills was found in Herbert Smallwood's shoe, police said.

BROTHER AIDS STATE IN MD. MURDER CASE

His brother's testimony was used by the prosecution Tuesday to bulwark the case against Herbert Smallwood, on trial for murder in Charles County Circuit Court.

State's attorney Robert T. Barbour put Robert Smallwood, 30, on the stand as his last witness to testify that Herbert, 23, did not go home during the night John C. Wheeler, a Rison (Md.) tavernkeeper, was robbed and slain.

Herbert's "oral confession" was admitted as evidence after a long legal wrangle, but Judges J. Dudley Digges and John B. Gray ruled out the admission of lie detector tests given the Negro brothers a day after the slaying.

"Confessed" Role

In the confession, Herbert was quoted as saying he broke into Wheeler's tavern some time after midnight on May 17, beat the man to death, looted a cash drawer of about $87, and set the drawer on fire.

His confession denied, tho, that he set fire to the dead man's bed. Firemen found Wheeler on the blazing bed a few hours later.

Robert Smallwood testified he went to bed in their home about 9:30 p.m., and woke up about dawn. Herbert was not there either time, he said.

Witnesses testified Monday that the lie detector tests cleared Robert, altho his cap was found near Wheeler's inn, and he had a blood spot on his shirt when he was arrested. Robert was held as a material witness.

Recalls Drinking

The only witness put on the stand by defense attorneys F. DeSales Mudd and George T. Bowling was Herbert Smallwood. He said all he could recall was drinking the day before the murder, and going home to bed about 9:30 p.m. He could not even remember being taken to Washington, where Detective Sgt. James K. McCarty of the District police force gave the lie tests, he stated. McCarty and Charles county Sheriff R. Vernon Cooksey testified Tuesday morning about the tests and Herbert's reported confession.

The judges adjourned the trial until Wednesday at 9:30 a.m., when attorneys will make their final arguments to the all-male jury.

Murder Verdict Found in Case of Smallwood

La Plata Jury Finds Laborer Guilty in Slaying Of Tavern Owner

By Paul Sampson
Post Reporter

La Plata, Md. July 29. A Circuit Court jury today found Herbert Smallwood, a 23-year-old laborer, guilty of murder in the first degree after only 25 minutes of deliberation.

The jury made no stipulation on capital punishment. As a result, the two-judge court which heard the case will decide whether Smallwood will hang or be sentenced to life imprisonment.

Chief Judge John B. Gray said a date for sentencing will be announced later.

Smallwood's two court-appointed attorneys said they would make a motion for a new trial on grounds that the court was in error in admitting an oral confession Smallwood made. The attorneys said they would appeal if the motion is denied.

No Show of Emotion

Smallwood, a slender man dressed in a faded white shirt and old blue dungarees, received the verdict without apparent emotion as he stood in the warm Charles County courtroom. After the verdict, he sat down and rubbed his chin and nose as he had done throughout the three-day trial.

The jury began deliberating at 2:40 p.m. and returned at 3:05 p.m.

Smallwood was charged in the robbery-slaying of John Clarence (Stormy) Wheeler, 64-year-old Rison tavern owner. Rison is 5 miles south of Indian Head, Md. Wheeler was found beaten to death in his tavern the morning of May 17. The tavern had been set on fire, and Wheeler's body was charred.

Judge Makes Charge

Judge Gray's charge to the jury and defense and prosecution summations centered about the oral confession Smallwood made and the circumstancial evidence on which the State based its case.

Judge Gray, who heard the case with Judge J. Dudley Digges, called the confession the "crucial question." He warned the jury that the law is very "jealous" of confessions. Judge Gray cautioned the all-male jury there is always the danger that a confession is not given freely. He urged the jury to weigh the confession issue carefully.

Judge Gray also explained circumstantial evidence to the jury and said it is not convincing unless all links in it are complete.

Defense Attorneys F. DeSales Mudd and George T. Bowling scored both the circumstantial evidence and the alleged confession in their summations.

Mudd said the gun found near Smallwood's home, the fingernail scapings which showed traces of human blood, and the blood-stained currency found in Smallwood's shoe, did not link him to the slaying.

There is no proof, he contended, that either the money or gun came from Wheeler's tavern or that the blood under the fingernail was Smallwood's own. Mudd tried to show that a cap belonging to Smallwood's brother, Robert, 30, with whom he lived, and a small blood stain on Robert's shirt collar could just as well link Robert to the slaying. The cap was found near Wheeler's tavern after the slaying.

Bowling said the confession was not a free and voluntary statement and thus should not have been admitted. He said the sustained questioning Smallwood underwent and a Maryland's State trooper's alleged remark to him that he would enhance his chances by confessing, invalidate the confession.

Charles County Jury Seeks Verdict Today In Smallwood Trial

By J. L. Michael
Star Staff Correspondent

La Plata, Md., July 29.—A Charles County jury will try to decide today whether Herbert Smallwood is guilty of beating a 64-year-old tavern keeper to death in a robbery and then setting fire to the place to hide the crime.

Only summations of counsel and the court's charge remain to be heard before the fate of the colored ex-convict is placed in the hands of the all-male panel.

Circuit Judges John B. Gray, jr. and J. Dudley Digges, presiding over the three-day trial, permitted the jurors to return to their homes last night. The court ordered them not to discuss the case in which Smallwood, 23, is charged with the first degree murder of John D. Wheeler, a World War I veteran who lived alone in his tavern at Rison, near Indianhead, was fatally beaten last May 17.

Both Sides Rest

State and defense attorneys rested their cases yesterday after the defense lost it fight to prevent introduction of a confession made by Smallwood after he submitted to lie detector tests.

The court ruled that results of the test conducted by District Detective Sergt. James K. McCarty were inadmissible but directed that the jury decide whether statements prompted by them were illegally obtained.

Herbert Smallwood and his brother Robert, 30, both of whom were arrested a few hours after the crime submitted to the test. Robert was not charged presumably because the device reacted favorably to his story. He testified for the State.

Testified In Own Defense

Herbert Smallwood, labeled a liar by the detector, took the stand twice, once in a futile attempt to block admission of the confession, and later as the only defense witness.

A total of 24 State witnesses recited how smoke pouring from a window of the tavern brought volunteer firemen, State and county police and medical authorities to the scene. Firemen found a wooden cash drawer ablaze on a gas stove and Mr. Wheeler bruised and charred nearby on a smoldering mattress.

A doctor said he died of multiple blows on the head.

Both Herbert Smallwood and his brother testified yesterday that they drank heavily the day before the crime. Robert said he went to bed in his home near the tavern at dark and slept until daylight. He was unable to say when Herbert came home during the night.

Was Paid At Tavern

The defendant said he had earned $40 cutting pulpwood a week preceding the crime and was paid by his employer at Mr. Wheeler's tavern about noon on May 16. Smallwood said he paid Mr. Wheeler a bill for $19 then set out on a drinking spree at other taverns. About dark, he testified, his memory blacked out.

On the stand he said he did not remember where he was when the crime was committed, did not remember when he was arrested and did not recall the lie detector test two days later.

He did not explain why two blood-stained $20 bills were found in his shoe or why a Luger pistol taken from the tavern was recovered from a grassy plot near his home. He also said he could not remember details of his long criminal record.

Robert Smallwood admitted on the stand that a cap found just outside a window of the tavern the morning of the crime belonged to him. He said he did not know how it came to be there. He also conceded that a blood-stained blue shirt placed in evidence was his and said he was wearing it the night of May 17.